IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-529

MONTANA POWER COMPANY, ET AL., *Petitioners*

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL.

No. 76-585

AMERICAN PETROLEUM INSTITUTE, ET AL., *Petitioners*

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL.

No. 76-594

INDIANA-KENTUCKY ELECTRIC CORPORATION, ET AL., *Petitioners*

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL.

No. 76-603

ALABAMA POWER COMPANY, ET AL., *Petitioners*

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL.

No. 76-619

UTAH POWER AND LIGHT COMPANY, ET AL., *Petitioners*

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL.

No. 76-620

WESTERN ENERGY SUPPLY AND TRANSMISSION ASSOCIATES, ET AL., *Petitioners*

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITIONERS IN NO. 76-619

RESPONSE TO MOTION TO DISMISS THE WRITS OF CERTIORARI AS IMPROVIDENTLY GRANTED OR TO VACATE AND REMAND AND TO MOTION OF INTERVENOR RESPONDENTS SUGGESTING MOOTNESS

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Petitions for writs of certiorari were granted by the Court on April 4, 1977, to determine whether the prevention of deterioration regulations promulgated by the Environmental Protection Agency were authorized by the Clean Air Act and, if so, whether such regula-

tions could validly include the provisions concerning reclassification of Federal and Indian lands. Subsequent to the filing of petitioners' briefs on the merits on or before May 19, 1977, amendments to the Clean Air Act were enacted. Pub. L. 95-95, 91 Stat. 685 (Aug. 7, 1977) (hereinafter 1977 Amendments). Respondents, the Environmental Protection Agency, *et al.* (EPA), and intervenor respondents, Sierra Club, *et al.*, now move to dismiss these consolidated cases. The intervenor respondents contend that the amendments "dispose of any doubt as to [the two issues before the Court]. Consequently, [the intervenor respondents argue] the case before this Court is *essentially* moot" (Motion of Intervenor Respondents Suggesting Mootness, p. 1, emphasis supplied). The federal respondents argue that "the controversy as to the issues on which certiorari was granted has been effectively mooted by the new legislation. . ." (Motion to Dismiss the Writs of Certiorari As Improvidently Granted Or to Vacate and Remand, p. 7) (hereinafter EPA Motion to Dismiss). For the reasons set forth below we urge the Court to deny both motions and to hear and decide these consolidated cases. We think it clear that the issues before this Court are *not* moot. Events have occurred and continue to occur under the regulations as promulgated and presented before this Court that demonstrate that there remains a "live" controversy. Thus, it remains of continuing importance that the Court decide the merits of the issues presented.[1]

[1] Petitioners in Nos. 76-529, 76-594 and 76-603 have filed with the Court a response to respondents' and intervenor respondents' motions to dismiss. We endorse that response. Arguments made in that response will not be repeated here.

I.

THERE IS A CONTINUING AND ACTUAL CONTROVERSY THAT NECESSITATES RESOLUTION ON THE MERITS OF THE ISSUES UPON WHICH THE COURT GRANTED THE PETITIONS FOR WRITS OF CERTIORARI.

The Court, in granting the petitions for writs of certiorari, limited the questions to:

1. Whether regulations promulgated by the Environmental Protection Agency to prevent the significant deterioration of air quality are authorized by the Clean Air Act.
2. Whether the Clean Air Act permits the Environmental Protection Agency to adopt regulations which grant to Federal land managers and Indian governing bodies power to reclassify Federal and Indian lands within their jurisdiction.

No matter what effect the 1977 Amendments have subsequent to August 7, 1977—the date of their enactment—the Amendments do not address the issues before the Court. The questions remain whether when and as promulgated the regulations were statutorily authorized. Resolution of those issues remains important, as demonstrated by events that have occurred and continue to occur under the challenged regulations.

As an example, one of the petitioners in No. 76-619, Utah Power & Light Co. and respondent EPA are presently engaged in a separate suit, *Utah Power & Light Co.* v. *Environmental Protection Agency,* Civ. No. C-77-0063 (D. Ut.), which involves the application of the challenged regulations to three steam electric power plants which commenced construction prior to

June 1, 1975.[2] Respondent EPA has ruled that certain actions regarding those three units have occurred since June 1, 1975 [3] which constitute "modifications", as that term is defined in the regulations.[4]

While petitioner Utah Power & Light Co. of course is not now seeking to argue the merits of that case before this Court, the above facts are important in light of respondents' statement that "the regulations themselves, as sustained by the court of appeals, remain in effect *except to the extent superseded by the 1977 Amendments*" (EPA Motion to Dismiss, p. 7; emphasis supplied). As the intervenor respondents recognize, the 1977 "amendments modify the definition contained in the regulations for the commencement of construction (Sec. 164(b)) [*sic.*], a provision which governs which major new sources will be subject to review under the regulations and the statute" (Motion of Intervenor Respondents Suggesting Mootness, p. 5 n.2). Section 168(b) provides that "[i]n the case of a facility on which *construction was commenced in accordance with this definition* after June 1, 1975, and prior to the enactment of the Clean Air Act Amend-

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[2] The validity of the regulations is not at issue in that suit. In fact, Utah Power & Light Co. could not have challenged the validity of the regulations in that suit. *See Utah Power & Light Co.* v. *Environmental Protection Agency,* 553 F.2d 215, 218-19 (D.C. Cir. 1977).

[3] 40 C.F.R. § 52.21(d)(1) of the regulations states that "any new or modified stationary source . . . which has not commenced construction or modification prior to June 1, 1975" is subject to the review of new sources provisions of the regulations.

[4] *See* EPA Motion for Summary Judgment, p. 2, Civ. No. C-77-0063 (D. Ut.). "Modification" is defined in 40 C.F.R. § 52.01(d). EPA is seeking to require Utah Power & Light Co. to add an estimated $75 million worth of scrubber equipment to the three steam electric power plants.

ments of 1977, the review and permitting of such facility shall be in accordance with the regulations for the prevention of significant deterioration . . ." (emphasis supplied). "Commenced" is defined by the 1977 Amendments as a major emitting facility which "has obtained all necessary preconstruction approvals or permits . . . and either has (i) begun, or caused to begin, a continuous program of physical on-site construction of the facility or (ii) entered into binding agreements or contractual obligations . . ." § 169(2)(A). The challenged regulations—in contrast to the definition in the 1977 Amendments—define "commenced" as "a continuous program of construction *or modification*" § 52.21(b)(7) (emphasis supplied). In short, the "modification" of a source is no longer subject to the permit provisions.

However, in its most recent pleading in the Utah district court case, filed September 6, 1977,[5] EPA continues to advocate that Utah Power's three steam electric power plants at issue must obtain permits under the regulations because of alleged "modifications." Absolutely no reference is made in that pleading to the 1977 Amendments. Since the definition of "commenced" in the 1977 Amendments alters the definition of "commenced" in the regulations, EPA's pleading in that case conflicts with its representations made in this Court in its Motion to Dismiss, filed August 26, 1977, "that if such regulations would be inconsistent with specified sections of the new statute, *the regulations shall be deemed amended to conform with the requirements of those sections*" (EPA Motion to Dismiss, p. 5) (emphasis supplied). EPA's continued enforcement of the challenged regulations as promulgated, and unamended by the 1977 Amendments, belies its argument that the issues in these consolidated cases are now moot. So long as EPA continues to enforce the regulations at issue here, this case remains a "live" controversy.

[5] EPA Reply Memorandum in Support of Motion for Summary Judgment and Motion for a Protective Order, Civ. No. C-77-0063 (D. Ut.).

This situation is noticeably different from the one existing in *Environmental Protection Agency* v. *Brown,* —— U.S. ——, 97 S.Ct. 1635 (1977). In *Environmental Protection Agency* v. *Brown,* the government admitted that the contested regulations were invalid unless modified in certain respects. The Court therefore vacated the courts of appeals judgments and remanded for consideration of mootness. On remand, the Court of Appeals for the District of Columbia found the controversy moot. Not only had the contested regulations been modified, but "[t]he Administrator state[d] that he [was] not enforcing the regulations." *District of Columbia* v. *Costle,* No. 74-1013, slip op. at 4 (D.C. Cir. Aug. 19, 1977). In contrast, in *Utah Power & Light Co.* v. *EPA, supra,* the Administrator continues to enforce the challenged regulations that are before this Court.

Another example of the continuing importance of the issues in this case is a redesignation that occurred prior to the enactment of the 1977 Amendments. On August 5, 1977, the Northern Cheyenne Indian Reservation was redesignated from a Class II area to a Class I area pursuant to the regulations. 42 Fed. Reg. 40695 (Aug. 11, 1977). Petitioners discussed at length in their brief the land use impact of such redesignation, pointing out that a redesignation can affect land

use planning 60-100 miles outside of the redesignated area. Brief for the Petitioners in No. 76-619, pp. 39-44. In fact, the respondent EPA's ruling approving the Northern Cheyenne redesignation specifically noted that "the construction of electric power plant units known as Colstrip 3 & 4 . . . as proposed, would violate the Class I increments for SO_2 on the reservation . . ." 42 Fed. Reg. 40696 (Aug. 11, 1977). In a paper recently presented by EPA officials at the Annual Meeting of the Air Pollution Control Association, it was noted that the redesignation "could have a significant impact on proposed *future* development along the eastern boundary of [the] Crow reservation. . . ."[8] Thus, the effect of the Northern Cheyenne Indian Reservation redesignation will be a continuing one.

The Court has described mootness as "when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the income." *Powell* v. *McCormack,* 395 U.S. 486, 496 (1969). The issues upon which the petitions for writs of certiorari were granted remain "live" and petitioners maintain a legally cognizable interest in the outcome as the above actions indicate.

That the Court should decide the merits in this case is supported by recent decisions. In *National Coal Operators' Ass'n.* v. *Kleppe,* 423 U.S. 388 (1976), the Secretary of Interior had issued certain civil penalty assessment regulations. Coal mine operators argued

[8] "Prevention of Significant Deterioration of Air Quality: A Western Viewpoint" 8, U.S. Environmental Protection Agency, Denver, Colorado (emphasis supplied), presented at the 70th Annual Meeting of the Air Pollution Control Association, Toronto, Ontario, Canada (June 20-24, 1977).

that the regulations violated the Federal Coal Mine Health and Safety Act of 1969, 83 Stat. 742, 30 U.S.C. § 801, *et seq.* Subsequent to initiation of the suit, the regulations were reissued. Respondents, mine operators in the companion case, *Kleppe* v. *Delta Mining, Inc.,* 423 U.S. 403 (1976), argued that the case was moot. This Court rejected that argument, *inter alia,* "because there are assessments under the contested regulations awaiting enforcement". 423 U.S. at 393-394 n. 4.

Similarly, EPA is seeking to apply the challenged regulations to certain steam electric power plants under construction. As this Court has recognized, a case is not moot when "the challenged governmental activity in the present case is not contingent, has not evaporated or disappeared, and, by its continuing and brooding presence, casts what may well be a substantial adverse effect on the interests of the petitioning parties." *Super Tire Engineering Company* v. *McCorkle,* 416 U.S. 115, 122 (1974).

Furthermore, Congress—which was aware of this litigation[7]—included in the 1977 Amendments a savings clause that provides:

[7] The House Committee Report accompanying the bill to amend the Clean Air Act states:

> These regulations were immediately challenged by both industry and environmental groups. These suits are still pending and will likely take several more years to resolve. H.R. Rep. No. 95-294, 95th Cong., 1st Sess. 105 (May 12, 1977).

And the analogous Senate Committee Report states:

> The Circuit Court of Appeals gave broad support to existing EPA regulations in its decision. The case is now on appeal to the Supreme Court, and has been accepted for review. The earliest this case could be heard would be in the fall of the

> *No suit,* action, or other proceeding lawfully commenced by or against the Administrator . . . *shall abate by reason of the taking effect of the amendments made by the Act.* § 406(a) (emphasis supplied).

This Court has upheld the validity of savings clauses and ruled that cases pending on the date of enactment of a particular statute would not be affected where there was an appropriate savings clause. *See Train* v. *City of New York,* 420 U.S. 35, 41 n. 8 (1975); *Federal Trade Commission* v. *Goodyear Tire & R. Co.,* 304 U.S. 257 (1938). Thus, contrary to respondents' assertions, the "taking effect" of the 1977 Amendments does *not* abate these cases.

Subsection (b) of the savings provision is further evidence that Congress did not intend the 1977 Amendments to moot these cases. Section 406(b) provides that "[a]ll rules, regulations . . . or other actions *duly* issued, made, or taken by or pursuant to the Clean Air Act as in effect immediately prior to the date of enactment of this Act . . . *and not suspended by the Administrator or the courts,* shall continue in full force and effect . . . until modified or rescinded in accordance with the Clean Air Act as amended by this Act" (emphasis supplied). Thus, it remains for the Court to determine whether the regulations were "duly" issued.

1977 term of the Supreme Court. S. Rep. No. 95-127, 95th Cong., 1st Sess. 8 (May 10, 1977).

There is nothing in the legislative history that indicates Congress intended or foresaw that the 1977 Amendments would moot the cases presently before the Court.

II.

DISMISSAL OF THE WRITS AS IMPROVIDENTLY GRANTED IS NOT WARRANTED.

Respondents contend that "[i]n light of [the 1977 Amendments] . . . the questions upon which this Court granted certiorari are no longer appropriate for its consideration." Respondents seek a dismissal of "the writs on the ground that the subsequent legislation [the 1977 Amendments] has rendered the grants improvident" (EPA Motion to Dismiss, p. 6, 7). However, no matter what effect the 1977 Amendments have on the contested regulations, that effect could not warrant a dismissal of the writs as improvidently granted.

A dismissal of a writ as improvidently granted is warranted where circumstances that *existed* at the time of granting the petition for a writ of certiorari were not adequately brought to the Court's attention. Had *those* circumstances been adequately brought to the Court's attention "the writ would not have been allowed." *Furness, Withy & Co.* v. *Yang-Tsze Insurance Association,* 242 U.S. 430, 433 (1917). The occasional need to dismiss a writ as improvidently granted has been previously explained. With the large "volume of certiorari business, not to mention the remainder of the Court's business, the initial decision to grant a petition for certiorari must necessarily be based on a limited appreciation of the issues in a case. . . . The course of argument and the briefs on the merits may disclose that a case appearing on the surface to warrant a writ of certiorari does not warrant it. . . ." *Rogers* v. *Missouri Pacific Railroad Co.,* 352 U.S. 521, 527-528 (1957) (Frankfurter dissenting opinion). In light of "circumstances, which 'were not . . . fully ap-

prehended at the time certiorari was granted' . . . the writ of certiorari will be dismissed as improvidently granted." *The Monrosa* v. *Carbon Black Export, Inc.*, 359 U.S. 180, 183 (1959).

Respondents have demonstrated no circumstances that justify a dismissal of these writs as improvidently granted. Indeed, in their response to the petitions for writs of certiorari, respondents noted that bills had been introduced in the 95th Congress to amend the Clean Air Act. (Memorandum for the Federal Respondents, p. 8). Respondents' basis for a dismissal is not related to relevant undisclosed circumstances that existed when the petitions for writs of certiorari were granted, but rather is founded on circumstances that have occurred *subsequent* to the granting of the writs.

The two cases, *Rice* v. *Sioux City Memorial Park Cemetery,* 349 U.S. 70 (1955), and *Cook* v. *Hudson,* 429 U.S. 165 (1976), relied upon by respondents for dismissal are readily distinguishable from the present cases. *Rice* involved a constitutional challenge to a contract clause. A state statute was enacted *prior* to the filing of the petition for a writ of certiorari. The "statute that belatedly came to the Court's attention in *Rice* reached precisely the same situations that would have been covered by a decision in this Court sustaining the petitioner's claim on the merits." *Jones* v. *Alfred H. Mayer Co.,* 392 U.S. 409, 417-418 n. 21 (1968). The Court remarked that "[h]ad the statute been properly brought to our attention and the case thereby put into proper focus" certiorari would have been denied. 349 U.S. at 76. Accordingly, the Court dismissed the writ as improvidently granted.

The Court in *Cook* v. *Hudson,* 429 U.S. 165, granted a petition for a writ of certiorari challenging the constitutionality of the termination of a teacher by a Mississippi public school board. Subsequent to the termination but *prior* to the filing of the petition for a writ of certiorari, a Mississippi statute was passed that prohibited the type of school board action that took place. In light of that statute and a case decided subsequent to the time of granting the writ, the Court dismissed the writ as improvidently granted.

The writs were dismissed as improvidently granted in *Rice* and in part in *Cook* because of circumstances existing at the time of granting the petitions for the writs. In the present cases, respondents and intervenor respondents seek dismissal solely because of circumstances occurring *subsequent* to the time of granting the petitions for writs.

Although respondents contend that the writs were improvidently granted, they argue that "the controversy as to the issues on which certiorari was granted has been effectively *mooted* by the new legislation" (EPA Motion to Dismiss, p. 7; emphasis supplied). If indeed dismissal is warranted—which petitioners contend it is not—then these proceedings should be dismissed as moot.[8] Should the Court dismiss the writs as moot, petitioners respectfully request that in accordance with its long-standing practice it reverse or vacate the lower court judgment and remand with a direction to dismiss. *See Preiser* v. *Newkirk,* 422 U.S. 395 (1975); *United States* v. *Munsingwear, Inc.,* 340 U.S. 36, 39 n. 2 (1950) and cases cited therein. In that manner "the rights of all parties are preserved; none is prejudiced by a decision which in the statutory scheme was only preliminary." *Id.* at 40.

[8] Intervenor respondents have moved to dismiss as moot. *See* Motion of Intervenor Respondents Suggesting Mootness.

Intervenor respondents suggest that an alternative course of action for this Court is to "remand the cases to the Court of Appeals for determination of the effect of the new law on the regulations, as to the period prior to August 7, 1977" (Motion of Intervenor Respondents Suggesting Mootness, p. 8). Respondents believe "that little purpose would be served" by a remand. (EPA Motion to Dismiss, p. 7). Similarly, petitioners believe that such a remand is inappropriate. The lower court has already ruled that the regulations were authorized by the existing law. The 1977 Amendments do not address the issue of whether the regulations were authorized at the time of issuance. It is that issue which is before the Court. To remand to the court of appeals as intervenor respondents suggest could result in that court rendering an advisory opinion.

CONCLUSION

For the foregoing reasons, petitioners request the Court to deny respondents' and intervenor respondents' motions to dismiss. At the very least, neither of those motions should be granted by the Court prior to full briefing on the merits and oral argument. Should the Court grant the motions to dismiss, the judgment of the lower court should be reversed or vacated and remanded with a direction to dismiss, in accordance with the Court's established practice.

Respectfully submitted,

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